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Fraudulent Joinder, Federalism, and the Twombly/Iqbal Problem

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FRAUDULENT JOINDER, FEDERALISM, AND THE TWOMBLY/IQBAL PROBLEM

Charles W. Oldfield¹

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INTRODUCTION

Fraudulent joinder exists when a plaintiff includes a claim against a non-diverse defendant, upon which the plaintiff has no hope of recovering, to prevent a diverse defendant from removing the case to federal court based on diversity jurisdiction.² The United States Supreme Court has held that a federal district court can ignore the citizenship of a fraudulently joined defendant in determining whether the court has diversity jurisdiction.³ The federal courts have not adopted a uniform test to determine whether a plaintiff has fraudulently joined a non-diverse defendant.⁴ All agree, however, that the analysis is similar to that used to decide a motion to dismiss for failure to state a claim upon which relief can be granted.⁵

The need for federal diversity jurisdiction has been long-debated because of its implications for federalism and state sovereignty.⁶ A 1969 American Law Institute study noted that diversity jurisdiction resulted in state judicial power being less extensive than state legislative authority.⁷ The study highlighted that “[s]o long as federal courts continue to decide cases arising under state law without the possibility of state review, the state’s judicial power is less extensive than its legislative power; this is an undesirable interference with state autonomy.”⁸

Because questions of fraudulent joinder are analyzed much like a motion to dismiss for failure to state a claim, the United States Supreme Court’s decisions in *Bell Atlantic Corporation v. Twombly*⁹ and *Ashcroft v. Iqbal*¹⁰ have led to additional inconsistency in fraudulent joinder analysis and have further complicated the federalism and state sovereignty concerns in cases that raise claims of fraudulent joinder.¹¹

In *Twombly* and *Iqbal* the Supreme Court held that to survive a motion to dismiss for failure to state a claim upon which relief can be granted, a complaint filed in federal court must plead sufficient facts to show that the claim is plausible on its

² 14C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3723.1 (Rev. 4th ed. 2019).

³ See *Wecker v. Nat’l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907); see also *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999); *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir. 1998); *Jackson v. Cooper Tire & Rubber Co.*, 57 F. Supp. 3d 863, 867 (M.D. Tenn. 2014).

⁴ See E. Farish Percy, *The Fraudulent Joinder Prevention Act of 2016: Moving the Law in the Wrong Direction*, 62 VILL. L. REV. 213, 222–24 (2017).

⁵ See *Broadway v. State Farm Mut. Auto. Ins.*, 683 F. App’x 801, 803 (11th Cir. 2017); *Int’l Energy Ventures Mgmt., L.L.C. v. United Energy Grp.*, 818 F.3d 193, 200 (5th Cir. 2016); *Johnson v. Am. Towers, L.L.C.*, 781 F.3d 693, 704 (4th Cir. 2015); *Hubbard v. Federated Mut. Ins.*, 799 F.3d 1224, 1227 (8th Cir. 2015); *Universal Truck & Equip. Co. v. Southworth-Milton, Inc.*, 765 F.3d 103, 108 (1st Cir. 2014); *Dutcher v. Matheson*, 733 F.3d 980, 988 (10th Cir. 2013); *Walker v. Philip Morris USA, Inc.*, 443 F. App’x 946, 954 (6th Cir. 2011); *Morris v. Nuzzo*, 718 F.3d 660, 666 (7th Cir. 2013); *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir. 1998); *Batoff v. State Farm Ins.*, 977 F.2d 848, 852 (3d Cir. 1992); *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987).

⁶ See E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 189, 199–200 (2005).

⁷ AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 99 (1969).

⁸ *Id.*

⁹ See 550 U.S. 544, 554–57 (2007).

¹⁰ See 556 U.S. 662, 678 (2009).

¹¹ See Percy, *supra* note 4, at 234–36 (discussing the federalism concerns raised by the plausibility standard).

face.¹² “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”¹³ *Twombly* and *Iqbal* arguably imposed a “plausibility” pleading standard that is more difficult to meet than the notice-pleading standard federal courts had previously applied.¹⁴ The majority of state courts, however, have not adopted the *Twombly/Iqbal* pleading standard. Instead, most states continue to apply the more lenient notice-pleading standard.¹⁵ At least one federal court has recognized that “[t]he applicable pleading standard . . . can be dispositive of the question of diversity jurisdiction” in cases involving claims of fraudulent joinder.¹⁶ A federal court might find fraudulent joinder if it applied the *Twombly/Iqbal* pleading standard but find that the non-diverse defendant was properly joined if it applied a state notice-pleading standard.¹⁷ The possibility of conflicting results based on which pleading standard the court applies has important implications for principles of federalism and state sovereignty.

So, should a federal district court look to the state or federal pleading standard when deciding whether a plaintiff has fraudulently joined a non-diverse defendant? On the one hand, states have the authority to develop and apply their own procedural rules and substantive law. Diversity jurisdiction interferes with a state’s authority to do those things. On the other, the purpose of diversity jurisdiction is to protect diverse citizens from the potential local bias of state courts.¹⁸ Also, Congress has the authority to regulate the procedures applicable in federal court and to establish, within constitutional limits, the jurisdiction of federal courts. There is also a strong federal interest in ensuring uniform procedures for federal courts.

Two circuit courts of appeals have addressed the question of the applicable pleading standard in a fraudulent joinder analysis in published opinions and they reached opposite conclusions.¹⁹ The Eleventh Circuit Court of Appeals held that federal district courts must look to the state pleading standard;²⁰ the Fifth Circuit Court of Appeals held that federal district courts must apply the heightened

¹² *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

¹³ *Id.*

¹⁴ See *infra* text accompanying notes 23–30.

¹⁵ Jill Curry & Matthew Ward, *Are Twombly & Iqbal Affecting Where Plaintiffs File? A Study Comparing Removal Rates by State*, 45 TEX. TECH L. REV. 827, 855 (2013).

¹⁶ *In re Regions Morgan Keegan Securities, Derivative, and ERISA Litig.*, No. 2:09-MD-2009-SHM, 2013 WL 2404063, at *9 (W.D. Tenn. May 31, 2013) (citation omitted).

¹⁷ *Id.* at *11.

¹⁸ See THE FEDERALIST NO. 80, at 477 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁹ Compare *Stillwell v. Allstate Ins.*, 663 F.3d 1329, 1334 (11th Cir. 2011) (“To determine whether it is possible that a state court would find that the complaint states a cause of action, we must necessarily look to the pleading standards applicable in state court, not the plausibility pleading standards prevailing in federal court.”), with *Int’l Energy Ventures Mgmt., L.L.C. v. United Energy Grp.*, 818 F.3d 193, 200–02 (5th Cir. 2016) (holding that precedent dictates the federal pleading standard is used to determine whether a complaint states a cause of action). The Third Circuit Court of Appeals applied the *Twombly/Iqbal* standard in an unpublished opinion. *Roggio v. McElroy, Deutsch, Mulvaney & Carpenter*, 415 F. App’x 432, 433 (3d Cir. 2011).

²⁰ *Stillwell*, 663 F.3d at 1334 (“To determine whether it is possible that a state court would find that the complaint states a cause of action, we must necessarily look to the pleading standards applicable in state court, not the plausibility pleading standards prevailing in federal court.”).

Twombly/Iqbal standard.²¹ Courts in other jurisdictions are split on which pleading standard to apply to questions of fraudulent joinder.²²

This Article examines the split among the district courts within the Sixth Circuit to illustrate and discuss whether federal courts should apply the forum state's notice-pleading standard or the heightened *Twombly/Iqbal* federal pleading standard to questions of fraudulent joinder. This Article proposes that federal courts should apply the state pleading standard and adopt a uniform test for fraudulent joinder—the “state-court failure-to-state-a-claim” test. Under this test, the federal district court would ask whether the claim against the non-diverse defendant would survive a motion to dismiss for failure to state a claim upon which relief can be granted in state court. If it would, then the non-diverse defendant has not been fraudulently joined, and the case should be remanded to state court. When applying the state pleading standard, the federal district court should resolve any ambiguities in state law or questions about the propriety of removal in favor of remand. The state-law failure-to-state-a-claim test will ensure that federal diversity jurisdiction is exercised in conformity with the constitutional limits prescribed by Article III, Section 2 of the Constitution and Supreme Court precedent. The test also respects the principles of federalism and state sovereignty.

Part I of this Article discusses the federal pleading standard before and after *Twombly* and *Iqbal* and the notice pleading standard that prevails in most state courts. Part II provides an overview of diversity jurisdiction, discusses the fraudulent joinder exception to the complete diversity requirement, and identifies forum shopping issues that arise from diversity jurisdiction. Next, in Part III, the Article provides details of a case to illustrate the issue of the applicable pleading standard for a fraudulent joinder analysis. The split in the courts over the applicable standard is discussed in Part IV. Part V proposes that federal courts apply the forum state's pleading standard and adopt the state-court failure-to-state-a-claim test to analyze fraudulent joinder. This part also discusses potential problems with other proposed tests. The conclusion summarizes the reasons the state-court failure-to-state-a-claim test is the appropriate test.

I. NOTICE PLEADING AND TWOMBLY AND IQBAL

A. *The pleading standard under the Federal Rules of Civil Procedure*

Before the Supreme Court's decisions in *Twombly* and *Iqbal*, federal courts applied a “notice pleading” standard to determine whether a complaint stated a claim

²¹ *Int'l Energy Ventures*, 818 F.3d at 200.

²² See *Greenberg v. Macy's*, No. 11-4132, 2011 WL 4336674, at *6 (E.D. Pa. Sept. 15, 2011) (“This does not end the fraudulent joinder inquiry, however. In deciding whether to remand, some district courts have applied the ‘heightened pleading standard’ set forth in *Ashcroft v. Iqbal* and *Bell Atlantic Corp. v. Twombly*.” (citations omitted)); see also *Texas Ujoints, L.L.C. v. Dana Holding Corp.*, No. 13-C-1008, 2013 WL 6230675, at *4 (E.D. Wis. Dec. 2, 2013); *McConnell v. Funk*, No. 2:10-cv-97KS-MTP, 2010 WL 4736257, at *3 (S.D. Miss. Nov. 16, 2010); *Positive Results Mktg. v. Buffalo-Lake Erie Wireless Sys. Co.*, No. 3:CV-08-0382, 2008 WL 2096865, at *2 (M.D. Pa. May 16, 2008).

upon which relief could be granted.²³ Under the notice pleading standard, the complaint had to provide “a short and plain statement of the claim” that would give the defendant fair notice of what the claim was and the grounds for the claim.²⁴ A claim would be dismissed only if “it appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of [the] claim which would entitle him to relief.”²⁵ *Twombly* and *Iqbal* changed that.

In *Twombly* and *Iqbal* the Supreme Court considered the interaction of the pleading standard under Federal Rule of Civil Procedure 8(a)(2)²⁶ and the standard federal courts must apply when deciding a motion to dismiss for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).²⁷ The Court held that to survive a motion to dismiss for failure to state a claim upon which relief can be granted, the plaintiff had to plead sufficient facts that, when “accepted as true,” would “state a claim [for] relief that [was] plausible on its face.”²⁸ So, under the Federal Rules of Civil Procedure, it is no longer enough to simply “offer[] ‘labels and conclusion,’ or ‘a formulaic recitation of the elements of a cause of action.’”²⁹ Plaintiffs must plead facts sufficient to show that there is “more than a sheer possibility” that the defendant is liable.³⁰

There is, of course, a debate about the practical effect of *Twombly* and *Iqbal*.³¹ Some studies have found that *Twombly* and *Iqbal* have not had a statistically significant effect on dismissal rates; other studies have reached the opposite conclusion.³² Whatever the statistical effect, the split in the district courts on whether to apply the state pleading standard or the federal pleading standard demonstrates that district court judges think the *Twombly/Iqbal* standard is significantly different than the notice-pleading standard.

²³ *Conley v. Gibson*, 355 U.S. 41, 47 (1957), *abrogated by* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

²⁴ *Id.* (quoting FED. R. CIV. P. 8(a)(2)).

²⁵ *Id.* at 45–46.

²⁶ The Rule provides:

- (a) Claim for Relief. A pleading that states a claim for relief must contain:
 - (1) a short and plain statement of the grounds for the court’s jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
 - (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
 - (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

FED. R. CIV. P. 8(a).

²⁷ See *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009); *Twombly*, 550 U.S. at 554.

²⁸ *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

²⁹ *Id.* (quoting *Twombly*, 550 U.S. at 555).

³⁰ *Id.*

³¹ Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2119 (2015) (“The central question that continues to be widely debated is whether the introduction of *Iqbal* and *Twombly*’s plausibility framework has significantly affected the outcome of litigation in district courts.”).

³² *Id.* at 2119–20.

B. State courts continue to apply a notice-pleading standard.

The majority of states continue to apply a notice-pleading standard post-*Twombly/Iqbal*.³³ For example, the states that make up the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee) have adopted rules of civil procedure that are modeled after the Federal Rules,³⁴ but none have followed the United States Supreme Court's lead and adopted the *Twombly/Iqbal* pleading standard.³⁵ Instead, the state courts in those jurisdictions continue to apply a notice-pleading standard when deciding a motion to dismiss for failure to state a claim upon which relief can be granted.³⁶ Under the state notice-pleading standard, just as under the former federal notice pleading standard, a plaintiff who joins a non-diverse defendant to her state court action need only provide a short and plain statement of the claim that would give the defendant fair notice of what the claim is and the grounds for it.³⁷

II. FEDERAL DIVERSITY JURISDICTION: AN OVERVIEW

A. The historical basis of diversity jurisdiction

Article III, Section 2 of the Constitution gives federal courts jurisdiction over "controversies . . . between citizens of different States."³⁸ Writing in Federalist No.

³³ Curry & Ward, *supra* note 15, at 855; see also Danielle Lusardo Schantz, *Access to Justice: Impact of Twombly & Iqbal on State Court Systems*, 51 AKRON L. REV. 951, 964–65 (2017) (explaining that out of 30 replica jurisdictions, "[f]ive have chosen to . . . adopt [the] plausibility pleading," "seven have remained committed to notice pleading," and "[t]he remaining 18 jurisdictions . . . continue to utilize notice pleading by default").

³⁴ *Whaley v. Whitaker Bank, Inc.*, 254 S.W.3d 825, 828 (Ky. App. 2008) ("The Kentucky Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure."); *Miller v. Chapman Contracting*, 730 N.W.2d 462, 468 (Mich. 2007); *Felix v. Ganley Chevrolet, Inc.*, 49 N.E.3d 1224, 1230 (Ohio 2015) ("Because the Ohio Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, federal law interpreting the federal rule is appropriate and persuasive authority in interpreting a similar Ohio rule."); *Thomas v. Oldfield*, 279 S.W.3d 259, 262 (Tenn. 2009) ("The Tennessee Rules of Civil Procedure were adopted in 1970 and were modeled on the Federal Rules of Civil Procedure prior to their 1970 amendments.").

³⁵ See *Hardin v. Jefferson Cty. Bd. of Educ.*, 558 S.W.3d 1, 9 (Ky. App. 2018) (applying the notice-pleading standard); *Johnson v. QFD, Inc.*, 807 N.W.2d 719, 726 (Mich. Ct. App. 2011) ("Michigan is a notice-pleading state. All that is required is that the complaint set forth 'allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend[.]'" (citation omitted)); *Smiley v. City of Cleveland*, No. 103987, 2016 WL 6673178, at *1 (Ohio Ct. App. Nov. 10, 2016) ("It is important to note that Ohio has not adopted the heightened federal pleading standard outlined in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, which requires a plaintiff to plead sufficient facts that state a 'plausible' claim for relief." (citation omitted)); *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 430 (Tenn. 2011) ("This case squarely presents the question of whether Tennessee should adopt the federal *Twombly/Iqbal* plausibility pleading standard. Although federal judicial decisions 'interpreting rules similar to our own are persuasive authority for purposes of construing the Tennessee rule,' they 'are non-binding even when the state and federal rules are identical.' We decline to adopt the new plausibility standard and adhere, for the following reasons, to the notice pleading standard and the principles discussed in section 1 above that have long governed Tennessee pleading practice." (citations omitted)).

³⁶ See cases cited *supra* note 35.

³⁷ See cases cited *supra* note 35.

³⁸ U.S. CONST. art. III, § 2, cl. 1.

80, Alexander Hamilton said that diversity jurisdiction was necessary to protect the privileges and immunities of citizens of different states:

To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.³⁹

The First Congress gave effect to Article III, Section 2 in the Judiciary Act of 1789 and provided that federal courts had concurrent jurisdiction with state courts over suits “between a citizen of the State where the suit [was] brought, and a citizen of another State” when the amount in controversy exceeded \$500.⁴⁰ In 1806, the Supreme Court, in an opinion by Chief Justice Marshall, interpreted the Judiciary Act of 1789 and held that complete diversity must exist for a federal court to exercise diversity jurisdiction⁴¹:

The words of the act of congress are, ‘where an alien is a party; or the suit is between a citizen of a state where the suit is brought, and a citizen of another state.’ The court understands these expressions to mean that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.⁴²

This means that “diversity jurisdiction does not exist unless *each* defendant is a citizen of a different State from *each* plaintiff.”⁴³

The First Congress also provided for removal of cases from state court to federal court when the plaintiff sued an out-of-state defendant and the amount in controversy exceeded the monetary threshold.⁴⁴ Removal is governed by 28 U.S.C. §§ 1441⁴⁵ and 1446.⁴⁶

³⁹ *Id.*; see also Charles J. Cooper & Howard C. Nielson, Jr., *Complete Diversity and the Closing of the Federal Courts*, 37 HARV. J.L. & PUB. POL’Y 295, 295–96 (2014).

⁴⁰ Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73. Today the amount in controversy must exceed \$75,000. 28 U.S.C. § 1332(a) (2018).

⁴¹ *Strawbridge v. Curtiss*, 7 U.S. 267, 267 (1806), *overruled in part by Louisville, Cincinnati, & Charleston R.R. v. Letson*, 43 U.S. 497 (1844).

⁴² *Id.*

⁴³ *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978).

⁴⁴ Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73.

⁴⁵ 28 U.S.C. § 1441 (2018).

⁴⁶ 28 U.S.C. § 1446 (2018).

B. Fraudulent joinder as an exception to the complete diversity requirement

The United States Supreme Court has recognized fraudulent joinder as an exception to the complete diversity requirement.⁴⁷ If the removing defendant can show that a non-diverse defendant was fraudulently joined, the federal district court can ignore the citizenship of the non-diverse defendant when deciding whether the court has subject-matter jurisdiction.⁴⁸

The phrase “fraudulent joinder” is a misnomer, but it “has become a term of art.”⁴⁹ The removing party need not show that the plaintiff harbored some improper motive in joining the non-diverse defendant or that the plaintiff’s action in joining the non-diverse defendant was fraudulent in the legal sense of the term.⁵⁰ In short, the plaintiff’s motive is immaterial.⁵¹ The test is “a proxy for establishing the plaintiff’s fraudulent intent. If the plaintiff has no hope of recovering against the non-diverse defendant, the court infers that the only possible reason for the plaintiff’s claim against [that defendant] was to defeat diversity and prevent removal.”⁵² Of course, if the removing party can show actual fraud in the plaintiff’s joinder of a non-diverse defendant, then removal is proper.⁵³

The federal circuit courts apply different tests to determine whether a plaintiff has fraudulently joined a non-diverse defendant.⁵⁴ As one author has noted, most circuit courts use similar, though not identical, tests that consider related factors:

Most courts employ some variant of the following four predominant tests to determine fraudulent joinder: (i) the “reasonable basis for the claim” test that focuses on whether there is a reasonable basis in law and fact for the claim against the [non-diverse defendant], (ii) the “no possibility” of recovery test that asks whether there is any possibility the plaintiff will recover from the [non-diverse defendant], (iii) the “reasonable possibility” of recovery test that asks whether there is any reasonable possibility the plaintiff will recover from the [non-diverse defendant], and (iv) the failure to state a claim test that focuses on whether the complaint states a claim against the [non-diverse defendant] pursuant to state law.⁵⁵

When a federal district court is deciding a claim of fraudulent joinder, “disputed questions of fact and [any] ambiguities in the controlling . . . state law” must be

⁴⁷ See *Wecker v. Nat’l Enameling & Stamping Co.*, 204 U.S. 176, 185–86 (1907).

⁴⁸ *Jackson v. Cooper Tire & Rubber Co.*, 57 F. Supp. 3d 863, 867 (M.D. Tenn. 2014).

⁴⁹ 13F CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3641.1 (3d ed. 2019).

⁵⁰ *Id.*

⁵¹ *Jackson*, 57 F. Supp. 3d at 867.

⁵² *In re Darvocet, Darvon and Propoxyphene Prods. Liab. Litig.*, 889 F. Supp. 2d 931, 936–37 (E.D. Ky. 2012) (quoting *Smith v. SmithKline Beecham Corp.*, No. 11-56-ART, 2011 WL 2731262, at *5 (E.D. Ky. July 13, 2011)).

⁵³ *Ross v. Citifinancial, Inc.*, 344 F.3d 458, 461 (5th Cir. 2003) (“Fraudulent joinder is established by showing: (1) actual fraud in pleading jurisdictional facts; or (2) inability of the [plaintiff] to establish a cause of action against the non-diverse [defendant].”).

⁵⁴ Percy, *supra* note 4, at 222–23.

⁵⁵ *Id.* (footnotes omitted).

construed “in favor of the non removing party,”⁵⁶ and “[a]ll doubts as to the propriety of removal [must be] resolved in favor of remand.”⁵⁷

C. Diversity jurisdiction and forum shopping

Plaintiffs often prefer state court⁵⁸ and research suggests with good reason.⁵⁹ One study compared plaintiff success rates in civil cases filed in federal court with the plaintiff’s success rates in cases removed from state court to federal court based on diversity jurisdiction.⁶⁰ The study found that the plaintiff won 57.97% of the civil cases they filed in federal court, but only 36.77% of those cases removed from state court to federal court.⁶¹

If a plaintiff files her action in state court and complete diversity exists, a defendant may remove the case to federal court.⁶² Most cases that are removed to federal court based on diversity jurisdiction remain there. For example, between April 5, 2016 and April 5, 2019, 4,123 cases were removed from state courts to federal district courts within the Sixth Circuit based on diversity jurisdiction.⁶³ Disposition data was available for 2,751 of those cases.⁶⁴ Of those 2,751 cases, more than 85% remained in federal court.⁶⁵ In other words, federal courts exercising diversity jurisdiction decided 2,360 cases that plaintiffs wanted their state courts to hear.⁶⁶

Cases removed from state court to federal court based on diversity jurisdiction make up a small, although not insignificant, part of a federal district court’s docket.⁶⁷ The threat of removal creates an incentive for plaintiffs to seek to join a non-diverse defendant, which precludes removal to federal court. There is also an incentive for defendants to remove cases to federal court and argue that the plaintiff fraudulently

⁵⁶ *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999) (quoting *Alexander v. Elec. Data Sys. Corp.*, 13 F.3d 940, 949 (6th Cir. 1994)).

⁵⁷ *Id.* (citing *Alexander*, 13 F.3d at 949).

⁵⁸ Victor E. Flango, *Attorneys’ Perspectives on Choice of Forum in Diversity Cases*, 25 AKRON L. REV. 41, 63 (1991) (“If their opponent is from out of state, most attorneys (70% of the attorneys in the state sample and 63% in the federal sample) who consider resident status important prefer to file [their cases] in state court.”).

⁵⁹ See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 599–600 (1998); Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs’ Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 AM. U. L. REV. 49, 55 (2009) (concluding that “[f]orum selection is often the most important strategic decision a party makes in a lawsuit”).

⁶⁰ Clermont & Eisenberg, *supra* note 59, at 598–99.

⁶¹ *Id.* at 593.

⁶² 28 U.S.C. § 1441 (2018).

⁶³ Data obtained from the Federal Judicial Center Integrated Database.

⁶⁴ Data obtained from the Federal Judicial Center Integrated Database. The date range used here was selected to limit the results to 5,000 or less because FJCID only permits file downloads of 5,000 or less.

⁶⁵ Data obtained from the Federal Judicial Center Integrated Database. Only 391 of the 2,751 cases were remanded to state court.

⁶⁶ During the same period, 66,085 cases were filed in those federal courts; thus, about 6.2% of the courts’ dockets was made up of cases removed based on diversity jurisdiction.

⁶⁷ According to statistics from the Federal Judicial Center’s Integrated Database, 278,684 civil cases were filed in federal court between January 1, 2018 and December 31, 2018. Of those, 21,406 or 7.68% were cases that were removed from state courts based on diversity jurisdiction.

joined the non-diverse defendant. These conflicting incentives lead to litigation over the question of fraudulent joinder and there seems to have been an increase in litigation on this issue.⁶⁸ One study found that the number of district court cases from the Fifth Circuit that referred to “fraudulent joinder” nearly tripled between 1990 and 2004.⁶⁹ Another study found an increase in fraudulent joinder litigation post-*Twombly/Iqbal*.⁷⁰ One sample showed that the question of fraudulent joinder arises in about 6.5% of cases removed from state courts within the Sixth Circuit based on diversity jurisdiction. The applicable pleading standard has the potential to affect a significant number of cases.

III. CLAIMS OF FRAUDULENT JOINDER—AN EXAMPLE

*Bertin-Resch v. U.S. Medical Management, L.L.C.*⁷¹ illustrates the problem of whether federal district courts should analyze fraudulent joinder in light of the state or federal pleading standard. Margaret Bertin-Resch filed a lawsuit in state court in which she alleged the following: She was employed as a practice manager by U.S. Medical Management, LLC.⁷² U.S. Medical Management also employed a physician, who had a history of bizarre behavior, and Melina Brown, who was Bertin-Resch’s supervisor.⁷³ One day the doctor came into the office and demanded that Bertin-Resch use her identity to wire money to the doctor’s friend.⁷⁴ Bertin-Resch refused, and the doctor became enraged.⁷⁵ He screamed at Bertin-Resch and engaged in other conduct, including throwing a phone at her, that “caused Bertin-Resch to fear for her safety.”⁷⁶ When the doctor left the office, Bertin-Resch locked the door and called her supervisor, Melina Brown, and told Brown what had happened.⁷⁷ Bertin-Resch told Brown that she was afraid of the doctor.⁷⁸ Brown then came to the office, unlocked the door, and let the doctor back into the office.⁷⁹ Bertin-Resch feared for her safety, so she left the office.⁸⁰ She was fired the next day.⁸¹

Bertin-Resch sued U.S. Medical Management, the doctor, and Brown in the Court of Common Pleas in Mahoning County, Ohio.⁸² She alleged claims of

⁶⁸ Percy, *supra* note 4, at 213.

⁶⁹ Percy, *supra* note 6, at 240.

⁷⁰ Kevin L. Pratt, *Twombly, Iqbal, and the Rise of Fraudulent Joinder Litigation*, 6 CHARLESTON L. REV. 729, 762–63 (2012) (finding that nearly forty percent of opinions on fraudulent joinder were issued after *Twombly* and *Iqbal* were decided). A Westlaw search of the Sixth Circuit database using the search (fraud! /s join!) & DA (Aft 04-04-2016) yielded 313 cases.

⁷¹ *Bertin-Resch v. U.S. Med. Mgmt, L.L.C.*, No. 4:15CV0090, 2015 WL 5595201 (N.D. Ohio Sept. 22, 2015).

⁷² *Id.* at *1.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at *2.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at *1.

wrongful termination and negligent hiring and retention against U.S. Medical Management, assault and battery against the doctor, and intentional infliction of emotional distress against Brown.⁸³ Bertin-Resch and Brown were citizens of Ohio.⁸⁴ U.S. Medical Management was a Delaware corporation with its principal place of business in Michigan.⁸⁵ The doctor was a citizen of South Carolina.⁸⁶ U.S. Medical Management and Brown removed the case to the United States District Court for the Northern District of Ohio and argued that Bertin-Resch had fraudulently joined Brown, i.e., had included a claim against Brown solely to defeat diversity jurisdiction.⁸⁷ Bertin-Resch moved to remand the case to state court.⁸⁸ Because Bertin-Resch and Brown were both Ohio citizens, the federal district court had to determine whether Bertin-Resch had fraudulently joined Brown.⁸⁹

Courts in the Sixth Circuit apply the “reasonable basis for the claim” test to decide questions of fraudulent joinder.⁹⁰ Under this test, the removing defendant must present sufficient evidence to show that the “plaintiff could not have established a cause of action against [the] non-diverse defendant[] under state law.”⁹¹ Thus, in *Bertin-Resch*, the district court had to determine whether there was a reasonable basis to predict that Bertin-Resch might succeed on her claim of intentional infliction of emotional distress against Brown, i.e., whether Bertin-Resch’s complaint stated a colorable claim of intentional infliction of emotional distress against Brown under Ohio law.⁹²

U.S. Medical Management, Brown, and Bertin-Resch disagreed about whether the federal district court had to consider the federal *Twombly/Iqbal* pleading standard or the Ohio notice-pleading standard when conducting its fraudulent joinder analysis.⁹³ U.S. Medical Management and Brown argued that the federal district court had to look to the heightened *Twombly/Iqbal* pleading standard.⁹⁴ Bertin-Resch pointed out that Ohio had not adopted the *Twombly/Iqbal* standard, but had instead retained the notice-pleading standard, so she argued that the federal district court had to apply Ohio’s notice-pleading standard.⁹⁵ The Sixth Circuit has not addressed this question,⁹⁶ and the district courts within the Sixth Circuit are split on the issue.⁹⁷

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at *2.

⁹⁰ *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999) (citing *Alexander v. Elec. Data Sys. Corp.*, 13 F.3d 940, 949 (6th Cir. 1994)).

⁹¹ *Id.*

⁹² *Bertin-Resch*, 2015 WL 5595201, at *2, *5.

⁹³ *Id.* at *3–4.

⁹⁴ *Id.* at *4.

⁹⁵ *Id.* at *3.

⁹⁶ *Id.* at *4; see also *Jackson v. Cooper Tire & Rubber Co.*, 57 F. Supp. 3d 863, 868 (M.D. Tenn. 2014) (“To add another layer of complexity, it does not appear that the Sixth Circuit has explicitly stated whether district courts assessing fraudulent joinder should consider the claims in light of the pleading standard applicable in state court rather than the federal pleading standard (if they differ).”).

⁹⁷ *Bertin-Resch*, 2015 WL 5595201, at *4. Compare *Smith v. Baker Concrete Constr., Inc.*, No. 1:13-CV-207, 2014 WL 3715125, at *4 (E.D. Tenn. Mar. 28, 2014) (applying the state pleading standard),

In *Bertin-Resch*, the federal district court was able to avoid deciding whether the state or federal pleading standard applied. The court found that the complaint articulated the factual basis for Bertin-Resch's intentional infliction of emotional distress claim and thus, the complaint met both the notice-pleading standard required by Ohio state courts and the heightened pleading standard required by *Twombly* and *Iqbal*.⁹⁸ As a result, the federal district court determined that Bertin-Resch had not fraudulently joined Brown and remanded the case to state court.⁹⁹ But the pleading standard the federal court chooses to apply can determine whether a case remains in federal court or is remanded to state court when removal is based on a claim of fraudulent joinder.¹⁰⁰

IV. THE SPLIT IN THE CIRCUIT COURTS

The Fifth and Eleventh Circuit Courts of Appeals have addressed the question of whether the *Twombly/Iqbal* federal pleading standard or the state notice-pleading standard applies to questions of fraudulent joinder. The Eleventh Circuit held that the state pleading standard applies,¹⁰¹ the Fifth Circuit held that federal district courts must apply the *Twombly/Iqbal* standard.¹⁰² Neither court discussed the federalism or state sovereignty implications of its decision. The Eleventh Circuit simply concluded that federal courts must necessarily use the state pleading standard to determine whether it is possible that a state court would find that the complaint stated a cause of action.¹⁰³ The Fifth Circuit concluded that its precedent and practical considerations required the application of the *Twombly/Iqbal* pleading standard.¹⁰⁴ Not surprisingly, district courts outside of the Fifth and Eleventh Circuits are split on whether to look to the federal or state pleading standard when deciding questions of fraudulent joinder. The split among the federal district courts within the Sixth Circuit exemplifies the issue.¹⁰⁵

Worrix v. Medtronic, Inc., No. 13-111-ART, 2013 WL 6834719, at *3 (E.D. Ky. Dec. 23, 2013) (applying the state pleading standard), and *In re Regions Morgan Keegan Sec., Derivative, & ERISA Litig.*, Nos. 2:09-md-2009-SHM, 2:10-cv-02260-SHM-dkv, 2013 WL 2404063, at *12-13 (W.D. Tenn. May 31, 2013) (applying the state pleading standard), with *Bell v. Zurich Ins. Co.*, No. 3:16CV984, 2016 WL 5118294, at *2 (N.D. Ohio Sept. 21, 2016) (applying the federal pleading standard and noting that its application could make a difference), *Murray Energy Holdings Co. v. Bloomberg, L.P.*, No. 2:15-CV-2845, 2016 WL 3355456, at *4 (S.D. Ohio June 17, 2016) (applying the federal pleading standard), and *Beavers v. DePuy Orthopaedics, Inc.*, No. 1:11 dp 20275, 2012 WL 1945603, at *3 (N.D. Ohio May 30, 2012) (applying the federal pleading standard).

⁹⁸ *Bertin-Resch*, 2015 WL 5595201, at *4 ("Plaintiff's Complaint clearly articulates the factual basis for her IIED claim as opposed to merely reciting conclusory legal statements . . .").

⁹⁹ *Id.* at *6.

¹⁰⁰ See *In re Regions Morgan Keegan Sec.*, 2013 WL 2404063, at *11.

¹⁰¹ *Stillwell v. Allstate Ins.*, 663 F.3d 1329, 1334 (11th Cir. 2011).

¹⁰² *Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 818 F.3d 193, 200, 208 (5th Cir. 2016).

¹⁰³ *Stillwell*, 663 F.3d at 1334.

¹⁰⁴ *Int'l Energy Ventures*, 818 F.3d at 208.

¹⁰⁵ See cases cited *supra* note 97.

In the Sixth Circuit, questions of fraudulent joinder are decided, with one exception,¹⁰⁶ based on the allegation in the complaint.¹⁰⁷ According to the Sixth Circuit, the analysis is similar to that used to decide a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).¹⁰⁸ So the applicable pleading standard (federal or state) is relevant to the fraudulent joinder analysis. Because the state courts within the Sixth Circuit still use the notice-pleading standard, however, there is a split among the district courts within the Sixth Circuit as to “whether state or federal law applies when testing the sufficiency of the pleadings on a fraudulent joinder inquiry.”¹⁰⁹

Federal district courts that apply the state notice-pleading standard tend to recognize that the plaintiff is the master of her complaint and that applying the federal standard would nullify “the lenient grounds on which a plaintiff may obtain remand back to state court.”¹¹⁰ At least one court has discussed the federalism concerns that would arise if the federal pleading standard were applied.¹¹¹ The district courts that choose to apply the federal pleading standard generally assert that the Federal Rules of Civil Procedure (and thus the *Twombly/Iqbal* standard) apply to a civil action after it is removed from state court to federal court.¹¹²

V. THE STATE-COURT FAILURE-TO-STATE-A-CLAIM TEST

A. *The need for uniformity*

The federal courts have not adopted a uniform standard for analyzing questions of fraudulent joinder,¹¹³ and the issue has been complicated by the Supreme Court’s decisions in *Twombly* and *Iqbal*. The split among the federal courts demonstrates that the current tests for fraudulent joinder can be difficult to apply.¹¹⁴ As an example,

¹⁰⁶ The court can pierce the pleadings and consider summary-judgment-type evidence to determine if “there are undisputed facts that [would] negate the claim.” *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 433 (6th Cir. 2012) (quoting *Walker v. Philip Morris USA, Inc.*, 443 F. App’x 946, 955–56 (6th Cir. 2011)).

¹⁰⁷ See *Walker*, 443 F. App’x at 952, 956 (“[T]he district court’s evaluation of the nature and sufficiency of the evidence supporting Plaintiffs’ claims against the Kentucky Defendants went beyond the inquiry contemplated by the limited pleading-piercing exception recognized as appropriate where an undisputed factual inaccuracy or insufficiency in the plaintiff’s claim against the in-state defendant is the basis of removal.”).

¹⁰⁸ *Id.* at 954 (“[T]he proper standard for evaluating that evidence remains akin to that of a Rule 12(b)(6) motion to dismiss and is arguably even more deferential.”).

¹⁰⁹ *Bertin-Resch v. U.S. Med. Mgmt., L.L.C.*, No. 4:15CV0090, 2015 WL 5595201, at *4 (N.D. Ohio Sept. 22, 2015); see also *Jackson v. Cooper Tire & Rubber Co.*, 57 F. Supp. 3d 863, 868–69 (M.D. Tenn. 2014) (noting a split of authority among the district courts within the Sixth Circuit and that the Sixth Circuit has not explicitly addressed the question.)

¹¹⁰ *Jackson*, 57 F. Supp. 3d at 868–69.

¹¹¹ See *id.* at 869.

¹¹² *Id.* at 868 (citing cases applying the *Twombly/Iqbal* standard); see also FED. R. CIV. P. 81(c)(1) (“These rules apply to a civil action after it is removed from a state court.”).

¹¹³ *Percy*, *supra* note 4, at 222–23.

¹¹⁴ See *Jackson*, 57 F. Supp. 3d at 867 (“As at least some district courts within this circuit have observed, applying the fraudulent joinder standard can be a difficult inquiry, because the Sixth Circuit’s ‘reasonable basis’ and ‘colorable cause of action’ standard leaves room for debate as to how deferential a

the Sixth Circuit's "reasonable basis to predict" test purports to look to the standard applicable to a motion to dismiss for failure to state a claim upon which relief can be granted, but then says that the "reasonable basis to predict" test is "arguably even more deferential" than the test for a motion to dismiss for failure to state a claim.¹¹⁵ The Sixth Circuit has not explained how much more deference is required by the "reasonable basis to predict" test. Further, the split on whether to look to the federal pleading standard or the state pleading standard demonstrates the need for a uniform test.

Because claims of fraudulent joinder necessarily implicate federalism and state sovereignty issues, the federal courts should adopt a uniform test that both respects the authority of state courts to decide questions of state law and ensures that plaintiffs do not file obviously meritless claims against non-diverse defendants solely to defeat diversity jurisdiction. The federal courts should follow the Eleventh Circuit's lead and adopt a test that asks whether the claim against the non-diverse defendant would survive a motion to dismiss for failure to state a claim upon which relief can be granted if the state court were deciding the question. If the claim against the non-diverse defendant would survive a motion to dismiss in state court, then the non-diverse defendant has not been fraudulently joined and the case should be remanded to state court. In applying the state-court failure-to-state-a-claim test, the federal courts should continue to apply the rules that disputed questions of fact and any ambiguities in the controlling state law must be construed in favor of the non-moving party¹¹⁶ and that "[a]ll doubts as to the propriety of removal [must be] resolved in favor of remand."¹¹⁷

The state-court failure-to-state-a-claim test would be easy to apply because it is a test that is familiar both to courts and counsel. It is also consistent with the limited jurisdiction of federal courts and respects and preserves the authority of state courts.

B. The state-court failure-to-state-a-claim test comports with principles of federalism.

Under our system of federalism, state courts construe state rules of civil procedure and federal courts construe federal rules of civil procedure.¹¹⁸ States are also free to develop their own substantive law, and federal courts sitting in diversity

court should be in evaluating the sufficiency of the plaintiff's claims for fraudulent joinder purposes, short of applying the Rule 12(b)(6) standard.").

¹¹⁵ Walker v. Philip Morris USA, Inc., 443 F. App'x 946, 954–55 (6th Cir. 2011) ("[T]he proper standard for evaluating that evidence remains akin to that of a Rule 12(b)(6) motion to dismiss, and is arguably even more deferential.")

¹¹⁶ Coyne v. Am. Tobacco Co., 183 F.3d 488, 493 (6th Cir. 1999).

¹¹⁷ *Id.*

¹¹⁸ Bahen v. Diocese of Steubenville, No. 11 JE 34, 2013 WL 2316640, at *3 (Ohio Ct. App. May 24, 2013) ("Consistent with federalism, it is the Ohio Supreme Court, rather than the United States Supreme Court, which has the sole authority to construe Ohio civil procedure. There is no Supremacy Clause conflict here; each court has the constitutional autonomy to construe the rules of pleadings governing cases filed in, respectively, Ohio and the federal courts.").

must apply state substantive law to state claims based on state law.¹¹⁹ Federal courts sitting in diversity apply the federal rules of procedure unless doing so would violate constitutional restrictions.¹²⁰

At first blush, the question of fraudulent joinder seems to be a question of procedure. This misconception is exacerbated because we discuss fraudulent joinder in conjunction with procedural rules such as removal and remand and because federal courts analogize fraudulent joinder analysis to the Federal Rule 12(b)(6) analysis. But when examined more closely, it becomes clear that the question of fraudulent joinder is a question of subject-matter jurisdiction—which court has lawful authority to hear and resolve the claim? The procedural rules are simply used as proxies to answer that subject-matter jurisdiction question.

“It is a long-recognized principle that federal courts sitting in diversity ‘apply state substantive law and federal procedural law.’”¹²¹ It is not always easy to distinguish between state substantive law and federal procedural law, however.¹²² The Rules Enabling Act grants the Supreme Court “the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts.”¹²³ According to the Act, “[s]uch rules shall not abridge, enlarge[,] or modify any substantive right.”¹²⁴ In *Sibbach v. Wilson & Co.*, the Supreme Court recognized that “Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States.”¹²⁵

In *Hanna v. Plumer*, the Supreme Court reaffirmed that Congress has properly granted it the authority to promulgate rules of procedure and that the test for the validity of such rules is whether the “rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.”¹²⁶ The *Hanna* court also recognized that a federal court cannot apply the Federal Rules when doing so would violate the Constitution.¹²⁷ Similarly, in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, the Supreme Court held that in a diversity

¹¹⁹ *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.”); see also *Lukowski v. CSX Transp., Inc.*, 416 F.3d 478, 484 (6th Cir. 2005) (“A federal court sitting in diversity applies the substantive law of the state in which it sits.” (quoting *Hayes v. Equitable Energy Res. Co.*, 266 F.3d 560, 566 (6th Cir. 2001))).

¹²⁰ *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

¹²¹ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 417 (2010) (Stevens, J., concurring in part and concurring in the judgment) (quoting *Hanna*, 380 U.S. at 465).

¹²² See *Hanna*, 380 U.S. at 471 (“The line between ‘substance’ and ‘procedure’ shifts as the legal context changes.”).

¹²³ 28 U.S.C. § 2072(a) (2018).

¹²⁴ *Id.* § 2072(b).

¹²⁵ *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9–10 (1941) (footnote omitted).

¹²⁶ *Hanna*, 380 U.S. at 464 (quoting *Sibbach*, 312 U.S. at 14).

¹²⁷ *Id.* at 471.

case, when there is a direct conflict between a state procedural rule and a federal procedural rule, the federal rule controls unless the federal rule runs afoul of the Rules Enabling Act.¹²⁸

The Supreme Court's decisions in *Sibbach*, *Hanna*, and *Shady Grove* do not require federal courts to apply the Federal Rules of Civil Procedure or the federal pleading standard to questions of fraudulent joinder;¹²⁹ nor do they prohibit applying a test based on a state pleading standard. First, the Federal Rules do not address the question of fraudulent joinder, so the rules are inapplicable. Second, even if the Federal Rules required federal courts to apply the *Twombly/Iqbal* federal pleading standard to the question of fraudulent joinder, applying that standard would expand the federal court's jurisdiction beyond the limits established by Article III, Section 2 and violate the Rules Enabling Act. Thus, under the reasoning of *Sibbach*, *Hanna*, and *Shady Grove*, the state procedural rule would control.

While *Sibbach*, *Hanna*, and *Shady Grove* do not provide an answer to the question of whether federal courts should apply the federal or the state pleading standard when analyzing questions of fraudulent joinder, another Supreme Court case, *Willy v. Coastal Corporation*,¹³⁰ does. In *Willy*, the Court said:

The Rules Enabling Act, 28 U.S.C. § 2072, authorizes the Court to “prescribe general rules of practice and procedure . . . for cases in the United States district courts. . . .” Those rules may not “abridge, enlarge or modify any substantive right.” In response, we have adopted the Federal Rules of Civil Procedure. Rule 1 governs their scope. It provides that “[t]hese rules govern the procedure in the United States district courts in all suits of a civil nature. . . .” Rule 81(c) specifically provides that the Rules “apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal.” This expansive language contains no express exceptions and indicates a clear intent to have the Rules . . . apply to all district court civil proceedings.¹³¹

While *Willy* said that Rule 81(c)'s “expansive language” “indicates a clear intent to have the [Federal] Rules [of Civil Procedure] . . . apply to all district court civil proceedings,”¹³² that was not the end of the Court's analysis.

The next step of the analysis, as the Court explained in *Willy*, is to determine whether applying the federal rule would impermissibly expand the federal court's jurisdiction:

[I]n *Sibbach v. Wilson & Co.*, we observed that federal courts, in adopting rules, were not free to extend or restrict the jurisdiction conferred by a statute. Such a caveat applies *a fortiori* to any effort to extend by rule the

¹²⁸ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 398 (2015).

¹²⁹ See Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 ALA. L. REV. 779, 813 (2006) (“Nothing in *Hanna v. Plumer*, the Rules Enabling Act, or any other component of the *Erie* doctrine interjects the Federal Rules into the interpretation or application of the federal jurisdictional statutes.” (footnotes omitted)).

¹³⁰ 503 U.S. 131 (1992).

¹³¹ *Id.* at 134–35.

¹³² *Id.*

judicial power of the United States described in Article III of the Constitution. The Rules, then, must be deemed to apply only if their application will not impermissibly expand the judicial authority conferred by Article III.¹³³

Some federal district courts have cited *Willy* and Federal Rules 1 and 81 to support using the *Twombly/Iqbal* standard when deciding questions of fraudulent joinder.¹³⁴ For example, in *Beavers v. DePuy Orthopaedics, Inc.*, the court analyzed the question of the applicable pleading standard this way:

In diversity actions, federal courts apply state substantive law and federal procedural law. Under Fed.R.Civ.P. 81(c)(1), “The[] [federal] rules apply to a civil action after it has been removed from a state court.” *See also* Fed.R.Civ.P. 1. Federal procedural rules also apply pending a resolution of the district court’s jurisdiction. *Willy v. Coastal Corp.*, 503 U.S. 131, 134–135, 112 S.Ct. 1076, 117 L.Ed.2d 280 (1992). Therefore, Plaintiffs’ arguments regarding application of Kentucky’s pleading standards are without merit.¹³⁵

Courts that rely on *Willy* to find that the federal pleading standard applies to questions of fraudulent joinder, as the court did in *Beavers*, skip the second part of the *Willy* analysis. The full analysis required by *Willy* shows that applying the *Twombly/Iqbal* pleading standard to determine fraudulent joinder impermissibly expands the diversity jurisdiction conferred by Article III in contravention of the Rules Enabling Act and the removal statute.

C. The state-court failure-to-state-a-claim test complies with the requirement that courts narrowly construe the removal statute.

To respect principles of comity and federalism and ensure that state courts are able to exercise their rightful authority, federal courts should strictly construe the removal statute, as the United States Supreme Court has long recognized.¹³⁶ Referring to the statute conferring diversity jurisdiction, the Supreme Court in *Healy v. Ratta* said:

The policy of the statute calls for its strict construction. The power reserved to the states, under the Constitution (Amendment 10), to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of

¹³³ *Id.* at 135 (citations omitted).

¹³⁴ “These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” FED. R. CIV. P. 1.

¹³⁵ *Beavers v. DePuy Orthopaedics, Inc.*, No. 1:11 dp 20275, 2012 WL 1945603, at *3 (N.D. Ohio May 30, 2012) (citations omitted).

¹³⁶ *Healy v. Ratta*, 292 U.S. 263, 270 (1934); *see also* *Long v. Bando Mfg. of Am., Inc.*, 201 F.3d 754, 757 (6th Cir. 2000) (“[B]ecause they implicate federalism concerns, removal statutes are to be narrowly construed.”).

the Constitution (article 3). Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.¹³⁷

The state-court failure-to-state-a-claim test complies with the Supreme Court's instruction that federal courts should strictly construe the removal statute. In doing so, this test respects the autonomy and jurisdiction of state courts.

This test also goes hand-in-hand with the requirement that federal courts sitting in diversity apply state substantive law.¹³⁸ If, as federal courts assert, the test for fraudulent joinder is less burdensome than that applied to a motion to dismiss for failure to state a claim,¹³⁹ it makes little sense for a federal district court to look to the more stringent *Twombly/Iqbal* "plausible on its face" pleading standard when analyzing questions of fraudulent joinder.¹⁴⁰

Although federalism concerns will arise in any case that raises a claim of fraudulent joinder, those concerns are perhaps most acute in cases where a federal court would more likely find the claim against the non-diverse defendant fails to meet the *Twombly/Iqbal* pleading standard—claims that raise novel issues of state law or issues on which state law is ambiguous.¹⁴¹ Federal courts exercising diversity jurisdiction over cases that raise those sorts of claims interfere with state autonomy and also produce significant functional consequences.¹⁴² The American Law Institute describes one such consequence as follows:

The diversion of state law litigation to federal tribunals that is fostered by the availability of diversity jurisdiction retards the formation and development of state law; to the extent that unsettled questions of state law are thus kept away from the state courts—and that extent can be, and at times has been, substantial and important—authoritative resolution of these questions is at least delayed and at times precluded.¹⁴³

In cases that present novel or ambiguous questions of state law, it may be difficult for the federal court to determine whether the plaintiff has presented a "colorable claim" under state law, particularly if the court looks to the *Twombly/Iqbal* pleading standard.¹⁴⁴ In cases that raised novel claims or presented questions upon which state law was ambiguous, the federal court would likely find that the claim against the non-diverse defendant did not meet the *Twombly/Iqbal* plausibility standard and thus

¹³⁷ *Healy*, 292 U.S. at 270.

¹³⁸ *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

¹³⁹ *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 433 (6th Cir. 2012) ("When deciding a motion to remand, including fraudulent joinder allegations, we apply a test similar to, but more lenient than, the analysis applicable to a Rule 12(b)(6) motion to dismiss.").

¹⁴⁰ *Combs v. ICG Hazard, L.L.C.*, 934 F. Supp. 2d 915, 923 (E.D. Ky. 2013).

¹⁴¹ *Percy*, *supra* note 4, at 235–36.

¹⁴² AM. LAW INST., *supra* note 7, at 99.

¹⁴³ *Id.*

¹⁴⁴ See Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1674–76 (1992) ("Difficulty arises when the federal courts must predict how the highest court of the state would decide the issue.").

conclude that the plaintiff had fraudulently joined the non-diverse defendant. The federal court would then dismiss the claim against the non-diverse defendant for failure to state a claim upon which relief can be granted.¹⁴⁵ That dismissal, if on the merits, could preclude the plaintiff from re-filing the claim against the non-diverse defendant in state court.¹⁴⁶ The state supreme court could not review the federal court's decision, and the federal court's decision would prevent the state courts from developing state law and policy on the claim raised by the plaintiff against the non-diverse defendant.¹⁴⁷ Such results incentivize forum shopping (removal) by defendants in cases that raise novel questions of state law or that raise claims upon which state law is ambiguous. Application of the *Twombly/Iqbal* pleading standard would tip the scales in favor of a finding of fraudulent joinder in cases that present claims that are novel or involve questions upon which state law is ambiguous.

Even if the federal district court disposed of the claim against the non-diverse defendant in a way that would not have preclusive effect, it might be cost-prohibitive for the plaintiff to pursue the claim against the non-diverse defendant in state court. Litigating parallel claims simultaneously in both state and federal court would likely result in duplicating the same efforts in each case, thereby increasing the expense of litigation for the plaintiff. It would also be judicially inefficient to have both a state and federal court hearing cases with common claims. And parallel litigation of claims with common facts could lead to inconsistent outcomes between the case heard in state court and the case heard in federal court.

Federal courts sitting in diversity and deciding novel or ambiguous questions of state law also squander limited federal court resources.¹⁴⁸ The federal courts' decisions interpreting ambiguous or novel questions of state law apply, for the most part, only to the parties to the litigation, so they lend little, if anything, to authoritative development of state law.¹⁴⁹ Federal courts interpreting ambiguous or novel questions of state law also increase the risk of creating conflicting decisions between an earlier federal court decision and a later state court decision.¹⁵⁰ Such conflicting

¹⁴⁵ See, e.g., *Mills v. Woodford Nat'l Bank*, No. 3:14-CV-00639-TBR, 2015 WL 1136502, at *3–4 (W.D. Ky. Mar. 12, 2015) (granting the non-diverse defendants' motion to dismiss for failure to state a claim and denying motion for remand).

¹⁴⁶ *Walton v. Bayer Corp.*, 643 F.3d 994, 1001 (7th Cir. 2011) ("So clear is this that the district court was right to invoke fraudulent joinder as a ground for dismissing Niemann from the case, with prejudice, leaving only diverse defendants."); *Carey v. Sub Sea Int'l, Inc.*, 121 F. Supp. 2d 1071, 1074–75 (E.D. Tex. 2000), *aff'd*, 285 F.3d 347 (5th Cir. 2002) (holding that plaintiffs could not refile claims in state court that had been dismissed by federal court based on a finding of fraudulent joinder); *Rogers v. City of Whitehall*, 494 N.E.2d 1387, 1389 (Ohio 1986) ("We hold that a claim litigated to finality in the United States district court cannot be relitigated in a state court when the state claim involves the identical subject matter previously litigated in the federal court, and there is present no issue of party or privity.").

¹⁴⁷ *Percy*, *supra* note 4, at 236.

¹⁴⁸ AM. LAW INST., *supra* note 7, at 99–100 ("From the point of view of the federal courts, the task of deciding such cases under state law imposes especially laborious burdens, often greater in fact than involved in resolving issues of federal law on which those courts may speak with their own authority. And although they may occasionally contribute to the development of state law, those heavy labors are essentially wasteful.").

¹⁴⁹ *Id.* at 100.

¹⁵⁰ See *id.* at 99–100.

results could negatively affect confidence in the judicial system, particularly for the party that lost in federal court:

In those cases in which an issue of state law is ultimately decided by the highest court of the state differently from a prior decision of the federal court, the losing federal litigant will feel aggrieved if it is explained to him that he would have won had his case been in the state court. That sense of grievance will be compounded when, given the choice, he would have preferred the state court in the first place.¹⁵¹

How much more would the sense of grievance be compounded in a case where the federal district court found the plaintiff had fraudulently joined a non-diverse defendant and retained jurisdiction over a case the plaintiff *had* filed in state court? These concerns are eliminated, or at least minimized, if the federal district court applies the state-court failure-to-state-a-claim test.

The state-court failure-to-state-a-claim test also ties in well with the current law on fraudulent joinder analysis in cases that raise novel issues of state law or on which state law is ambiguous. Because removal, even absent a claim of fraudulent joinder, raises federalism issues, courts must strictly construe the removal statute.¹⁵² It is also well settled that courts deciding fraudulent joinder must construe disputed questions of fact and ambiguities in state law in favor of the non-removing party and resolve all doubts about removal in favor of remand.¹⁵³ The state-court failure-to-state-a-claim test makes those things simpler to do because the federal district court need only determine whether the plaintiff's claim would survive a motion to dismiss in state court and any doubt as to that question should result in remand. Applying these standards, cases that raise novel issues or questions upon which state law is ambiguous would be more likely to survive a motion to dismiss under a notice pleading standard than the *Twombly/Iqbal* standard and thus, the federal courts would be less likely to find that the plaintiff fraudulently joined the non-diverse defendant. This, in turn, would provide opportunities for state courts to develop state law and would preserve scarce federal judicial resources.

D. The circuit courts that apply a state-court failure-to-state-a-claim test.

In *Stillwell v. Allstate Insurance Co.*, the Eleventh Circuit Court of Appeals reviewed a trial court's decision that found the plaintiff had fraudulently joined a non-diverse defendant.¹⁵⁴ In that case, Stillwell, a Georgia citizen, had purchased a landlord insurance policy from Allstate, an Illinois corporation.¹⁵⁵ A fire damaged the property for which the insurance had been purchased.¹⁵⁶ The property later suffered water damage.¹⁵⁷ Allstate denied claims related to the fire and water

¹⁵¹ *Id.* at 100.

¹⁵² *Alexander v. Elec. Data Sys. Corp.*, 13 F.3d 940, 949 (6th Cir. 1994).

¹⁵³ *See Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999).

¹⁵⁴ *Stillwell v. Allstate Ins. Co.*, 663 F.3d 1329, 1332 (11th Cir. 2011).

¹⁵⁵ *Id.* at 1331.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

damage, so Stillwell filed two actions in Georgia state court.¹⁵⁸ In the first, he sued Allstate alleging it had breached the insurance contract and acted in bad faith when it denied the claim for water damage.¹⁵⁹ “Allstate removed th[at] case to federal court based on diversity jurisdiction.”¹⁶⁰ Stillwell then sued Allstate and the Georgia insurance agency that had sold him the policy for denial of the claim for damage caused by the fire.¹⁶¹ In that suit, Stillwell alleged that Allstate had breached the insurance contract and acted in bad faith, and he alleged that the insurance agency had breached its fiduciary duty by failing to procure appropriate insurance coverage.¹⁶² Allstate also removed that case to federal court based on diversity jurisdiction.¹⁶³ Stillwell moved to remand the second case to state court.¹⁶⁴ He argued there was no diversity jurisdiction because he and the defendant insurance agency were both citizens of Georgia.¹⁶⁵ The federal district court denied the motion to remand and found that Stillwell had fraudulently joined the insurance agency.¹⁶⁶ The federal district court dismissed the claim against the insurance agency, consolidated the two cases against Allstate, and granted summary judgment for Allstate.¹⁶⁷ Stillwell appealed.¹⁶⁸

On appeal, Stillwell argued that the federal district court had erroneously applied the *Twombly/Iqbal* pleading standard when deciding his motion for remand.¹⁶⁹ The court of appeals agreed.¹⁷⁰ To reach its decision, the court looked to Georgia law applicable to Stillwell’s claim against the insurance agency.¹⁷¹ The court first recognized that under Georgia law, an insurance agent can be held liable for negligently failing to procure insurance.¹⁷² The court then noted an exception to that rule where the agent secured the policy but the insured failed to read the policy to determine whether the policy covered a particular risk.¹⁷³ Under Georgia law, the agent could not be held liable if the insured failed to read the policy.¹⁷⁴ The court then discussed two exceptions to the exception: the agent could be held liable where the agent held himself out as an expert or when there was a special relationship between the insured and the agent.¹⁷⁵

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1331–32.

¹⁶² *Id.* at 1332.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1333.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1333–34.

Stillwell claimed both exceptions applied, so he argued that the insurance agency could be held liable for its failure to procure appropriate insurance.¹⁷⁶ For the expert exception, Stillwell alleged that the insurance agency held itself out as an expert and that he reasonably relied on the agency's expertise to procure the appropriate insurance.¹⁷⁷ As to the special-relationship exception, Stillwell alleged that there was a special relationship between him and the insurance agency and that he relied on the insurance agency to determine the appropriate insurance coverage.¹⁷⁸

The federal district court had found that Stillwell's allegations against the insurance agency were conclusory and lacked factual specificity under the *Twombly/Iqbal* standard, so it concluded that Stillwell had fraudulently joined the insurance agency.¹⁷⁹ The court of appeals rejected the district court's analysis saying, "disregarding allegations as conclusory and requiring them to contain a certain amount of factual matter sounds a lot like the 12(b)(6) standard, not the fraudulent joinder standard."¹⁸⁰ The court of appeals then held that the federal district court should have looked to the state pleading standard:

Nothing in our precedents concerning fraudulent joinder requires anything more than conclusory allegations or a certain level of factual specificity. All that is required are allegations sufficient to establish "even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants." To determine whether it is possible that a state court would find that the complaint states a cause of action, we must necessarily look to the pleading standards applicable in state court, not the plausibility pleading standards prevailing in federal court.¹⁸¹

The court of appeals then concluded that Stillwell had met Georgia's notice-pleading standard and ordered that the fire damage case be remanded to state court.¹⁸²

Stillwell stands for the proposition that federal courts should look to the state pleading standard (and necessarily the standard applicable to a state court motion to dismiss for failure to state a claim upon which relief can be granted) when deciding questions of fraudulent joinder. And although the *Stillwell* court did not discuss the federalism or state sovereignty concerns that would arise from applying the heightened *Twombly/Iqbal* pleading standard, it seems a fair inference that such concerns, though unspoken, underlaid its analysis.

Two other circuits, the First and Ninth, have applied the state-law failure-to-state-a-claim test to questions of fraudulent joinder, although neither addressed the issue

¹⁷⁶ *Id.* at 1334.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1332, 1334.

¹⁸⁰ *Id.* at 1334.

¹⁸¹ *Id.* (citation omitted).

¹⁸² *Id.* at 1334–35.

in light of the *Twombly/Iqbal* standard.¹⁸³ The First Circuit has held that “removal is not defeated by the joinder of a non-diverse defendant where there is no reasonable possibility that the state’s highest court would find that the complaint states a cause of action upon which relief may be granted against the non-diverse defendant.”¹⁸⁴ The Ninth Circuit, in a case decided before *Twombly* and *Iqbal*, said that, “[i]f the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent.”¹⁸⁵

Sixth Circuit precedent also supports the state-law failure-to-state-a-claim test. In *Alexander v. Electronic Data Systems Corporation*, which was also decided before *Twombly* and *Iqbal*, the Sixth Circuit held that federal district courts must look to state law when assessing the sufficiency of the pleadings in a case removed to federal court.¹⁸⁶ In *Alexander*, the plaintiff, a Michigan citizen, sued a Texas corporation, its manager, personnel manager, and staffing manager in Michigan state court alleging state law claims of disability discrimination and fraud and misrepresentation.¹⁸⁷ The managers were all citizens of Michigan.¹⁸⁸ The Texas corporation removed the case to federal court and asserted, alternatively, federal question jurisdiction because the plaintiff’s claims were related to a plan covered by ERISA or diversity jurisdiction because the non-diverse defendants had been fraudulently joined.¹⁸⁹

The Sixth Circuit found there was no federal question jurisdiction¹⁹⁰ and then turned to the fraudulent joinder question. The court first addressed the claim of fraud and misrepresentation against the non-diverse defendants.¹⁹¹ The court said that:

*In addressing the sufficiency of pleadings, we must look to state law. In Michigan, “an action in fraud must definitely and issuably set forth the facts complained of and relied upon for recovery.” “A mere allegation or claim of fraud is not sufficient to establish a cause of action based thereon.”*¹⁹²

The court suggested the plaintiff had not sufficiently pleaded the fraud claim under state law.¹⁹³

The court then considered whether the plaintiff could establish that the non-diverse defendants were employers or agents and thus whether the defendants

¹⁸³ See *Universal Truck & Equip. Co. v. Southworth-Milton, Inc.*, 765 F.3d 103, 108 (1st Cir. 2014); *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987).

¹⁸⁴ *Universal Truck & Equip. Co.*, 765 F.3d at 108.

¹⁸⁵ *McCabe*, 811 F.2d at 1339.

¹⁸⁶ *Alexander v. Elec. Data Sys. Corp.*, 13 F.3d 940, 948 (6th Cir. 1994).

¹⁸⁷ *Id.* at 941.

¹⁸⁸ *Id.* at 942, 948.

¹⁸⁹ *Id.* at 942.

¹⁹⁰ *Id.* at 947.

¹⁹¹ *Id.* at 948.

¹⁹² *Id.* (emphasis added) (citations omitted) (first quoting *Dutkiewicz v. Bartkowiak*, 126 N.W.2d 705, 706 (1964); and then quoting *Hager v. Hager*, 125 N.W.2d 865, 867 (1964)).

¹⁹³ See *id.* at 948–49.

could be held liable for discrimination under Michigan law.¹⁹⁴ The Sixth Circuit remanded the case to the federal district court to determine whether it had diversity jurisdiction and “specifically whether [the non-diverse defendants] were fraudulently joined.”¹⁹⁵

When the *Alexander* court directed the district court to look to state law to determine the sufficiency of the pleadings, it recognized the preeminent role of state law in the fraudulent joinder analysis. The Sixth Circuit’s reasoning in *Alexander* supports adopting the state-court failure-to-state-a-claim test.

These cases show that the state-court failure-to-state-a-claim test is a workable standard and that federal courts will have little difficulty applying it.

E. Application of the state-court failure-to-state-a-claim test is consistent with other precedent.

Some courts have looked to the reasoning of *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*¹⁹⁶ to support applying the state-court failure-to-state-a-claim test. For example, *In re Regions Morgan Keegan Securities, Derivative, and ERISA Litigation*¹⁹⁷ applied the Sixth Circuit’s decision in *Miller v. Davis*, which was based on *Byrd*,¹⁹⁸ and concluded that it was appropriate to look to the state pleading standard to determine the question of fraudulent joinder.¹⁹⁹

In *Miller*, the Sixth Circuit set forth a three-part test to determine whether a federal district court, sitting in diversity, should apply a state procedural rule²⁰⁰:

1. If the state provision is the substantive right or obligation being asserted, the federal court must apply it.
2. If the state provision is a procedural rule which is intimately bound up with the substantive right or obligation being asserted, the federal court must apply it.
3. If the state provision is a procedural rule which is not intimately bound up with the substantive right or obligation being asserted, but its application *might* substantially change the outcome of the litigation, the federal court should determine whether state interests in favor of applying the state rule outweigh countervailing federal considerations against application of the rule. If the state interests predominate, the state rule should be adopted.²⁰¹

Under the three-part *Miller* test, federal courts would be required to apply the state pleading standard to questions of fraudulent joinder. The state procedural rule

¹⁹⁴ *Id.* at 949.

¹⁹⁵ *Id.*

¹⁹⁶ 356 U.S. 525 (1958).

¹⁹⁷ Nos. 2:09-md-2009-SHM, 2:10-CV-02260-SHM-dkv, 2013 WL 2404063 (W.D. Tenn. May 31, 2013).

¹⁹⁸ *Miller v. Davis*, 507 F.2d 308, 313–14 (6th Cir. 1974).

¹⁹⁹ *In re Regions Morgan Keegan Sec.*, 2013 WL 2404063, at *8–9.

²⁰⁰ *Miller*, 507 F.2d at 314.

²⁰¹ *Id.* (emphasis added) (footnotes omitted).

is intimately bound up with the substantive right because the state procedural rule (notice pleading) determines whether the substantive claim survives a motion to dismiss for failure to state a claim upon which relief can be granted. And it will always be the case that application of the state pleading standard *might* substantially change the outcome of the litigation. A federal district court *might* find fraudulent joinder if it applied the heightened *Twombly/Iqbal* pleading standard but find proper joinder if it applied a state notice-pleading standard. *In re Regions Morgan Keegan Securities*²⁰² illustrates this point.

The court in *In re Regions Morgan Keegan Securities* applied the *Miller* three-part test and, in doing so, recognized that “[t]he applicable pleading standard, which is a procedural rather than substantive issue, can be dispositive of the question of diversity jurisdiction.”²⁰³ There, the court found that the plaintiffs’ allegations against the non-diverse defendant were conclusory and would not have satisfied the federal *Twombly/Iqbal* pleading standard.²⁰⁴ The court looked to the state notice-pleading standard and concluded, however, that the plaintiffs’ claims alleged all of the elements of their causes of action against the non-diverse defendant and were sufficient to give the non-diverse defendant fair notice of the claims against him and the kind of evidence that might be needed to prove those claims.²⁰⁵ The court found that “[a]pplication of the federal pleading standard would . . . produce the opposite result from application of the [state] pleading standard.”²⁰⁶

After making that determination, the court applied step three of the *Miller* test and balanced the state and federal interests.²⁰⁷ It noted the state’s interest in allowing notice pleading and the federal interest in the efficiency of multidistrict litigation.²⁰⁸ The court also detailed the federalism concerns that favored applying the state procedural rule.²⁰⁹ It first emphasized that the basic issue was whether the court had subject-matter jurisdiction.²¹⁰ It found that if it applied the federal procedural rule—the *Twombly/Iqbal* pleading standard—the court would have jurisdiction because the plaintiff had not met the heightened pleading standard so the non-diverse defendant had been fraudulently joined; but if it applied the state notice-pleading standard, the court would lack jurisdiction because the non-diverse defendant would have been properly joined and remand would be required.²¹¹ The court then noted the limited jurisdiction of federal courts and said, “[s]o, although ‘there is a federal interest in having federal courts adjudicate all cases properly brought under a

²⁰² *In re Regions Morgan Keegan Sec.*, 2013 WL 2404063. This case was originally filed in a Texas state court. *Id.* at *1. The “[d]efendants removed the [case] to the United States District Court for the Northern District of Texas,” asserting both federal question and diversity jurisdiction. *Id.* The case was transferred to the United States District Court for the Western District of Tennessee upon an order of the Judicial Panel on Multidistrict Litigation. *Id.*

²⁰³ *Id.* at *8–9 (citation omitted).

²⁰⁴ *Id.* at *11.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at *12.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

jurisdictional grant from Congress,' there is an equally strong interest in not overstepping the bounds of jurisdiction and not deciding, without authority, cases that are properly before state courts."²¹² Finally, the court noted the federal interest in discouraging forum shopping.²¹³ After considering all of these interests, the court found that the state's interests predominated, and thus it applied the state pleading standard, determined that the non-diverse defendant had not been fraudulently joined, and remanded the case to state court.²¹⁴

F. The courts that have applied the Twombly/Iqbal standard to questions of fraudulent joinder failed to consider the federalism and state sovereignty concerns inherent in their decisions.

In *International Energy Ventures Management, L.L.C. v. United Energy Group, Ltd.*, the Fifth Circuit Court of Appeals held that the *Twombly/Iqbal* standard applies to questions of fraudulent joinder.²¹⁵ To reach its decision, the Fifth Circuit relied on three things: its decision in *Smallwood v. Illinois Central Railroad Co.*,²¹⁶ a case that was decided before *Twombly* and *Iqbal*; dictum from the Supreme Court's decision in *Grubbs v. General Electric Credit Corp.*,²¹⁷ which was decided before *Willy v. Coastal Corp.*,²¹⁸ and "practical reasons."²¹⁹ None of those three things require federal courts to apply the *Twombly/Iqbal* pleading standard when resolving questions of fraudulent joinder.

In *Smallwood*, which was decided five years before *Iqbal*, the Fifth Circuit said, "[o]rdinarily, if a plaintiff can survive a Rule 12(b)(6) challenge, there is no improper joinder."²²⁰ But the court in *Smallwood* did not say whether it was referring to a state Rule 12(b)(6) standard or a federal Rule 12(b)(6) standard, because, at the time, there was no difference between the two—both were based on a notice-pleading standard. So even had the *Smallwood* court specifically referenced the federal pleading standard as it existed in 2004 (notice pleading), its decision would not require federal courts to apply the *Twombly/Iqbal* standard.

The Fifth Circuit also relied on the Supreme Court's decision in *Grubbs*. The Fifth Circuit said:

In its opinion in *Grubbs v. General Electric Credit Corp.*, the Supreme Court reiterated that "[w]hile, of course, [a state] is free to establish such rules of practice for her own courts as she chooses, the removal statutes

²¹² *Id.* (quoting *Miller v. Davis*, 507 F.2d 308, 317 (6th Cir. 1974)).

²¹³ *Id.*

²¹⁴ *Id.* at *13.

²¹⁵ *Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 818 F.3d 193, 203–04, 208 (5th Cir. 2016). The Third Circuit Court of Appeals also looked to the *Twombly/Iqbal* pleading standard when reviewing a question of fraudulent joinder in *Roggio v. McElroy, Deutsch, Mulvaney & Carpenter*. 415 F. App'x 432, 433 (3d Cir. 2011) (providing no rationale for its decision to apply the *Twombly/Iqbal* standard).

²¹⁶ 385 F.3d 568 (5th Cir. 2004).

²¹⁷ 405 U.S. 699, 705 (1972).

²¹⁸ 503 U.S. 131 (1992).

²¹⁹ *Int'l Energy Ventures*, 818 F.3d at 202–08.

²²⁰ *Smallwood*, 385 F.3d at 573.

and *decisions of this Court* are intended to have uniform nationwide application.” It stated that federal law “must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts.”²²¹

But the issue in *Grubbs* was whether a party could challenge a removal procedure after a federal district court had entered judgment when the court had jurisdiction at the time it entered judgment.²²² *Grubbs* had nothing to do with state pleading standards, and the state rules of civil procedure played no role in the Court’s decision.²²³ Thus, the language upon which the Fifth Circuit relied was dictum. The Fifth Circuit also failed to mention or consider the Supreme Court’s subsequent decision in *Willy*, which held that a federal court should apply state procedural rules if applying the federal rules would impermissibly expand the court’s Article III jurisdiction.²²⁴

The Fifth Circuit also cited “practical reasons” to support its decision: chiefly, its conclusion that the *Twombly/Iqbal* standard would be easier for the federal courts to apply because of the familiarity of federal courts with that standard.²²⁵ The Fifth Circuit’s rationale is unpersuasive in this regard. First, federal “courts have continued to be confused [by the *Twombly/Iqbal*] standard [] and how and when it should be applied.”²²⁶ Second, federal courts sitting in diversity already interpret and apply state substantive law,²²⁷ so it seems unlikely that they would have difficulty applying a state notice-pleading standard, which, recall, looks to state substantive law.²²⁸ Further, practical considerations do not justify applying the *Twombly/Iqbal* standard when doing so would expand the scope of diversity jurisdiction beyond the bounds set by the Constitution. The Fifth Circuit also said:

[B]y uniformly applying the federal pleading standard, we ensure that the scope of federal subject matter jurisdiction does not differ serendipitously from state to state and district to district, because of nothing more than an accident of geography. We will thus avoid any differences attributable to nothing more than the whim and fancy of the laws in our three states.²²⁹

This reasoning fails to consider federalism principles and fails to respect state sovereignty. State laws, whether procedural or substantive, are not “whim and fancy” based on “accident[s] of geography.” State laws reflect the considered will of the

²²¹ *Int’l Energy Ventures*, 818 F.3d at 202–03 (footnotes omitted).

²²² *Grubbs*, 405 U.S. at 700 (“We have concluded that, whether or not the case was properly removed, the District Court did have jurisdiction of the parties at the time it entered judgment. Under such circumstances the validity of the removal procedure followed may not be raised for the first time on appeal, and we accordingly reverse the judgment of the Court of Appeals.”).

²²³ *See id.* at 705–06.

²²⁴ *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992).

²²⁵ *Int’l Energy Ventures*, 818 F.3d at 208.

²²⁶ Michelle S. Simon, *Hogan vs. Gawker II: A Statutory Solution to Fraudulent Joinder*, 70 BAYLOR L. REV. 1, 35 (2018).

²²⁷ *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

²²⁸ *See supra* Section I.B.

²²⁹ *Int’l Energy Ventures*, 818 F.3d at 208.

people of those states as reflected by their elected representatives and judges. For instance, some states have considered and rejected the *Twombly/Iqbal* pleading standard.²³⁰ Federal courts should respect the decisions of the courts in those states and apply the state procedural rules when to do otherwise would “impermissibly expand the judicial authority conferred by Article III.”²³¹ Courts that apply the heightened *Twombly/Iqbal* pleading standard fail to “scrupulously confine” their jurisdiction as required by *Healy v. Ratta*.²³²

While the state-court failure-to-state-a-claim test respects principles of federalism and state sovereignty, a test that applied the *Twombly/Iqbal* standard would further erode state sovereignty. The *Twombly/Iqbal* heightened pleading standard “create[s] perverse incentives”²³³ and nullifies more lenient state pleading standards. Attorneys filing claims in state court might anticipate removal and seek to meet the *Twombly/Iqbal* pleading standard, and thus deprive their clients of the benefits of the state’s notice-pleading standard.²³⁴ In fact, one author has advised plaintiff attorneys that “[t]he best practice is to draft your complaint with an eye to meeting the federal pleading requirement and to be detailed in your factual allegations.”²³⁵ Nullifying more lenient state notice-pleading standards is a particularly “perverse incentive” where the plaintiff wants to raise a novel claim or a claim upon which state law is ambiguous. It might be difficult or impossible for plaintiffs in those cases to meet the heightened pleading standard; it might also make it more difficult for potential plaintiffs to find counsel willing to pursue such claims.

Application of the *Twombly/Iqbal* standard might also encourage defendants to remove cases to federal court and then argue that the non-diverse defendant was fraudulently joined.²³⁶ Defendants in those cases would anticipate that the federal

²³⁰ E.g., *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2014) (“With this history in mind, we now decline to engraft the plausibility standard from *Twombly* and *Iqbal* onto our traditional interpretation of Minn. R. Civ. P. 8.01. We decline to do so despite the fact that the relevant text of Fed.R.Civ.P. 8(a)(2) is identical to the text of Minn. R. Civ. P. 8.01.”); *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 424 (Tenn. 2011) (“We address the issue of the proper standard for Tennessee courts to apply in ruling on a Rule 12.02(6) motion to dismiss in light of the United States Supreme Court’s recent decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*. We decline to adopt the new *Twombly/Iqbal* ‘plausibility’ pleading standard and affirm the judgment of the Court of Appeals.” (citations omitted)); see also *Ukau v. Wang*, No. CVA15-008, 2016 WL 4582244, at *5 (Guam Aug. 31, 2016) (“With this background in mind, we now decline to adopt the plausibility standard from *Twombly* and *Iqbal*, choosing instead to rely on our traditional interpretation of GRCP 8(a).”).

²³¹ *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992).

²³² See *Healy v. Ratta*, 292 U.S. 263, 270 (1934).

²³³ *Jackson v. Cooper Tire & Rubber Co.*, 57 F. Supp. 3d 863, 869 (M.D. Tenn. 2014).

²³⁴ See *id.*

²³⁵ Brenda M. Johnson, *Rebounding from Fraudulent Joinder*, TRIAL, Dec. 2018, at 36, 38.

²³⁶ But see *Curry & Ward*, *supra* note 15, at 829 (“There was no systematic increase in the rate of removal from state to federal courts after *Twombly* and *Iqbal*, and the effect was not more pronounced in notice-pleading states compared to fact-pleading states.”). *Curry and Ward* noted that while their study did not find support for the conclusion that the *Twombly/Iqbal* standard had an effect on the rate of removal in states that retain the notice-pleading standard, they acknowledged that their “study does not eliminate the possibility.” *Id.* at 872. Even assuming the *Twombly/Iqbal* standard does not affect the rate of removal, it may be that the rate of remand is decreased in federal district courts that apply the *Twombly/Iqbal* standard when deciding questions of fraudulent joinder.

court would ultimately dismiss the claim against the non-diverse defendant under the heightened *Twombly/Iqbal* standard.²³⁷

These “perverse incentives” either expand the scope of federal diversity jurisdiction in violation of Article III, Section 2 by allowing federal courts to retain jurisdiction over cases that are otherwise properly filed in state court, or they violate principles of federalism by de facto imposing the federal pleading standard on claims filed in state court.

G. Other proposed tests do not solve the federalism and state sovereignty problems or are likely to lead to judicial inefficiency.

Some have proposed that courts adopt a uniform test for fraudulent joinder based on the *Twombly/Iqbal* standard or some other standard. Those proposals, however, would either lead to additional litigation or fail to respect state autonomy.

Congress has twice considered legislation to amend 28 U.S.C. § 1447 to impose a uniform test for fraudulent joinder. In the 114th Congress, H.R. 3624, the Fraudulent Joinder Prevention Act,²³⁸ was passed by the House of Representatives but died in the Senate Judiciary Committee.²³⁹ The 115th Congress considered an identical bill, the Innocent Party Protection Act.²⁴⁰ That bill also passed the House but died in the Senate Judiciary Committee.²⁴¹ Among other things, those bills would have codified a requirement that federal courts use the *Twombly/Iqbal* plausibility standard to evaluate claims of fraudulent joinder.²⁴²

²³⁷ See *Jackson*, 57 F. Supp. 3d, at 869.

²³⁸ Fraudulent Joinder Prevention Act of 2016, H.R. 3624, 114th Cong. (2016).

²³⁹ H.R. 3624—*Fraudulent Joinder Prevention Act of 2016*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/3624/all-actions?overview=closed#tabs> [<https://perma.cc/3DJY-3CET>].

²⁴⁰ Innocent Party Protection Act, H.R. 725, 115th Cong. (2017).

²⁴¹ H.R. 725—*Innocent Party Protection Act*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/725/all-actions?overview=closed#tabs> [<https://perma.cc/M89J-S6XZ>].

²⁴² The relevant provision in the Fraudulent Joinder Prevention Act of 2016 reads as follows:

Section 1447 of title 28, United States Code, is amended by adding at the end the following:

“(f) FRAUDULENT JOINDER.—

“(1) This subsection shall apply to any case in which—

“(A) a civil action is removed solely on the basis of the jurisdiction conferred by section 1332(a);

“(B) a motion to remand is made on the ground that—

“(i) one or more defendants are citizens of the same State as one or more plaintiffs; or

“(ii) one or more defendants properly joined and served are citizens of the State in which the action was brought; and

“(C) the motion is opposed on the ground that the joinder of the defendant or defendants described in subparagraph (B) is fraudulent.

“(2) The joinder of the defendant or defendants described in paragraph (1)(B) is fraudulent if the court finds that—

Those bills would have required a finding of fraudulent joinder if, “based on the complaint and [and supplemental materials such as affidavits], it is not plausible to conclude that applicable State law would impose liability on [that] defendant.”²⁴³ As one commentator, who helped draft the legislation,²⁴⁴ noted, “[This] replaces standards like ‘no possibility of recovery’ with a uniform standard of ‘plausibility’ drawn from the Supreme Court’s *Twombly* and *Iqbal* decisions that redefined the federal pleading standard”²⁴⁵

The legislation also contained a provision that would have allowed the federal district court to permit the plaintiff to amend her pleadings because “the plaintiff, having filed a complaint in state court under state procedural rules, may not have anticipated application of a ‘plausibility’ or other Federal standard.”²⁴⁶ This provision would have abrogated current case law, which generally holds that when deciding questions of fraudulent joinder, federal courts cannot consider post-removal pleadings that attempt to defeat diversity jurisdiction.²⁴⁷ That the drafters of the legislation included this provision shows that they recognized that the applicable pleading standard could be outcome determinative on questions of fraudulent joinder.

Proponents of the legislation claimed it would prevent forum shopping and protect local businesses and individuals from being sued in cases in which they “had only a tangential or peripheral role.”²⁴⁸ Opponents argued the legislation was “the latest attempt to tilt the civil justice playing field in favor of corporate defendants.”²⁴⁹

Policy arguments aside, there are reasons to be concerned with the federalism issues inherent in the proposed legislation and the effect such legislation would have on state sovereignty.²⁵⁰ One scholar has argued that the legislation would have

“(A) there is actual fraud in the pleading of jurisdictional facts;

“(B) based on the complaint and the materials submitted under paragraph (3), it is not plausible to conclude that applicable State law would impose liability on each defendant . . . ;

“(C) State or Federal law clearly bars all claims in the complaint against all defendants . . . ; or

“(D) objective evidence clearly demonstrates that there is no good faith intention to prosecute the action against all defendants . . . or to seek a joint judgment.

“(3) In determining whether to grant or deny a motion under paragraph (1)(B), the court may permit the pleadings to be amended, and shall consider the pleadings, affidavits, and other evidence submitted by the parties.

“(4) If the court finds fraudulent joinder under paragraph (2), it shall dismiss without prejudice the claims against the defendant or defendants found to have been fraudulently joined and shall deny the motion described in paragraph (1)(B).”.

H.R. 3624, 114th Cong. § 2 (2016).

²⁴³ *Id.*

²⁴⁴ Arthur D. Hellman, *The Fraudulent Joinder Prevention Act of 2016: A New Standard and a New Rationale for an Old Doctrine*, FEDERALIST SOC’Y REV., June 2016, at 34, 36.

²⁴⁵ *Id.* at 38.

²⁴⁶ H.R. REP. NO. 114-422, at 16 (2016).

²⁴⁷ *Dotson v. Elite Oil Field Servs., Inc.*, 91 F. Supp. 3d 865, 870 (N.D. W. Va. 2015) (collecting cases).

²⁴⁸ H.R. REP. NO. 114-422, at 3-4 (2016).

²⁴⁹ *Id.* at 18.

²⁵⁰ *Id.* at 26-27.

intruded on the states' ability to shape state substantive and procedural law—the former by preventing state courts from deciding claims that raise novel or ambiguous questions of state law; the latter because many states have not adopted the *Twombly/Iqbal* pleading standard.²⁵¹ But “[t]he bill clearly contemplate[d] that when a case [was] removed to federal court based upon fraudulent joinder, the plaintiff’s complaint must satisfy the federal standard, even though it may be remanded back to state court for lack of jurisdiction.”²⁵²

Another scholar, downplaying the federalism and state sovereignty concerns, argued that the proposed legislation would likely have a negligible effect on the development of state law.²⁵³ He argued that the federalism and state sovereignty concerns were “unrealistic for the general run of fraudulent joinder cases” because the state appellate courts, rather than the state trial courts, shape state law.²⁵⁴ He continued that, in cases where the federal court had found that the plaintiff had fraudulently joined the non-diverse defendant, the claims against the non-diverse defendant were “marginal at best.”²⁵⁵ Thus, he concluded that “[t]he likelihood that these marginal claims would be decided on the merits at the trial level and ultimately decided by an appellate court seem[ed] quite remote.”²⁵⁶

The proponent of the legislation did not respond to the federalism concern that, by adopting a plausibility standard, the legislation would have given federal courts “the power to shape state pleading law.”²⁵⁷ As an opponent of the legislation noted:

When a suit is maintained in state court, the applicable pleading standard may not be the plausibility standard articulated in *Iqbal*. Yet when a Federal court is required to review a state law claim in the context of a remand motion, it will effectively be applying the heightened *Iqbal* pleading standard to the plaintiff’s claims against an in-state or local defendant, progressively undermining the authority of state courts to set their own pleading standards for state court cases.²⁵⁸

This would incentivize the careful plaintiff’s attorney to draft her state-court complaint with an eye toward meeting the heightened federal pleading standard, again, depriving her client of the benefit of the more lenient state pleading standard.²⁵⁹ The fear of removal might also deprive those with “marginal” claims of access to counsel because a plaintiff’s attorney would be less likely to file such claims for fear that the case would be removed and then the claim against the non-diverse defendant would be dismissed by the federal court.

The provision in the proposed legislation that would have allowed the plaintiff to amend her complaint prior to the federal district court deciding whether the

²⁵¹ Percy, *supra* note 4, at 235–37.

²⁵² *Id.* at 237; see also Simon, *supra* note 226, at 38–39.

²⁵³ See Hellman, *supra* note 244, at 43.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ H.R. REP. NO. 114-422, at 26 (2016).

²⁵⁸ *Id.* at 26–27 (emphasis added).

²⁵⁹ Jackson v. Cooper Tire & Rubber Co., 57 F. Supp. 3d 863, 869 (M.D. Tenn. 2014).

plaintiff had fraudulently joined a non-diverse defendant would not resolve the state sovereignty concerns. Instead, the plaintiff, who wanted to litigate her claims in state court in the first instance, is forced to meet the heightened *Twombly/Iqbal* standard, just so she can have her case remanded to state court (assuming she then could meet the plausibility standard), where the *Twombly/Iqbal* standard never applied.

Further, this legislation, a perceived cure for one ill—forum shopping by plaintiffs—would lead to another ill—encouraging defendants to remove cases when the non-diverse defendant was not fraudulently joined.²⁶⁰ Defendants face little risk by employing such tactics, and, even in cases that are remanded to state court, the defendants will have obtained the benefit of delay and the plaintiffs will have incurred the cost of time and money expended litigating the question of fraudulent joinder.²⁶¹

Empirical evidence seems to support the theory that adopting the *Twombly/Iqbal* standard would incentivize defendants to remove cases on specious claims of fraudulent joinder. A 2008 study, which analyzed data from 2004 and 2006 (pre-*Twombly*), found that in one district in 2004, 50% of cases that had been removed based on claims of fraudulent joinder were remanded to state court, while only 27% of other removed cases were remanded to state court.²⁶² The author found that cases alleging fraudulent joinder were far more likely to be remanded than other removed cases.²⁶³ It follows that defendants would think their odds of successfully removing a case and arguing fraudulent joinder would be better were the federal court required to apply the heightened *Twombly/Iqbal* plausibility standard.

Another proposal set forth a two-part test that first looks to the plausibility standard under *Twombly/Iqbal* and then shifts to a modified summary judgment-type analysis.²⁶⁴ Under this proposed test, if the plaintiff cannot meet the *Twombly/Iqbal* standard, which would ordinarily warrant dismissal, the removing defendant must show, by clear and convincing evidence, “that the plaintiff has not introduced any facts beyond the complaint, which gives rise to a plausible claim for relief.”²⁶⁵ *Tofighbakhsh v. Wells Fargo & Co.*²⁶⁶ was used to support the proposed two-part test.²⁶⁷ In *Tofighbakhsh*, the district court considered matters outside the complaint to decide the question of fraudulent joinder—information the plaintiff found on Wells Fargo’s website and affidavits submitted by the defendant.²⁶⁸ The court remanded the case based on that additional evidence.²⁶⁹

²⁶⁰ Percy, *supra* note 4, at 222.

²⁶¹ *Id.* at 235.

²⁶² Christopher Terranova, *Erroneous Removal as a Tool for Silent Tort Reform: An Empirical Analysis of Fee Awards and Fraudulent Joinder*, 44 WILLAMETTE L. REV. 799, 829 (2008); see also Percy, *supra* note 4, at 234.

²⁶³ Terranova, *supra* note 262, at 832 (“For all of the four circuits, remand was more likely in fraudulent joinder cases—from 6 to 12.5 times as likely.”).

²⁶⁴ Pratt, *supra* note 70, at 766–69.

²⁶⁵ *Id.*

²⁶⁶ No. 10-830 SC, 2010 WL 2486412, at *2 (N.D. Cal. June 16, 2010).

²⁶⁷ Pratt, *supra* note 70, at 769, 769 n.213.

²⁶⁸ *Tofighbakhsh*, 2010 WL 2486412, at *2.

²⁶⁹ *Id.* at *3.

The proposed two-part test based on *Tofighbakhsh* would be inefficient and would prolong litigation over the question of fraudulent joinder. Information needed (for either the plaintiff or the removing defendant) to meet step two of the test might be available only through discovery or might be in the hands of third parties and thus not readily available to the parties to the litigation absent resort to processes to compel its disclosure. A test that requires parties to submit additional evidence at the pleading stage could delay the litigation, impose additional costs, and lead to dismissal of claims that would survive a motion to dismiss under a state notice-pleading standard.

Another article proposed a “bad faith” test that would work in conjunction with 28 U.S.C. § 1446(c)(1).²⁷⁰ 28 U.S.C. § 1446 contains two subsections that are relevant here. The first provides:

[I]f the case stated by the initial pleadings is not removable, a notice of removal may be filed within thirty days after receipt by the defendant . . . of a copy of an . . . order . . . from which it may first be ascertained that the case is one which is or has become removable.²⁷¹

A case based on diversity jurisdiction may not be removed under this subsection more than one year after the action is commenced “unless the district court finds that the plaintiff has acted in bad faith” to prevent removal.²⁷² This subsection provides the basis for the proposed “bad faith” test.²⁷³

Under the proposed bad faith test, if a state court dismissed the claim against a non-diverse defendant, the diverse defendant could remove the case to federal court.²⁷⁴ The federal court would then determine, under 28 U.S.C. § 1446(c)(1), whether the plaintiff had acted in bad faith in joining the non-diverse defendant in the state court action.²⁷⁵ If the federal court found that the plaintiff had acted in bad faith, for example by joining a non-diverse defendant who could not be held liable under settled state law, then the case would remain in federal court.²⁷⁶ If the federal court found that the plaintiff had not acted in bad faith, say by alleging a claim on which the state law was unsettled, then the federal court would remand the case back to state court.²⁷⁷

The bad faith test would seem to eliminate some federalism and state sovereignty concerns because it would be the state court, rather than the federal court, that would determine the viability of the plaintiff’s claim against the non-diverse defendant in the first instance. But the bad faith test could lead to duplicative litigation with inconsistent results and could create more procedural problems than it would solve.

²⁷⁰ Emily L. Buchanan, *A Comity of Errors: Treading on State Court Jurisdiction in the Name of Federalism*, 55 S. TEX. L. REV. 1, 22 (2013).

²⁷¹ 28 U.S.C. § 1446(b)(3) (2018).

²⁷² *Id.* § 1446(c)(1).

²⁷³ Buchanan, *supra* note 270, at 22.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 22–23.

Imagine this hypothetical: A plaintiff sues a diverse and non-diverse defendant in state court. The state trial court dismisses the claim against the non-diverse defendant. The diverse defendant then removes the case to federal court based on diversity jurisdiction. The plaintiff appeals the state trial court's judgment dismissing the claim against the non-diverse defendant to the state appellate court²⁷⁸ and files a motion in federal court to remand the claim against the diverse defendant. The federal court finds that the plaintiff joined the non-diverse defendant in bad faith, so the federal court denies the plaintiff's motion to remand and retains jurisdiction over the claim against the diverse defendant. The state appellate court then reverses the state trial court's judgment dismissing the claim against the non-diverse defendant and remands the case to the state trial court.

In this hypothetical, the plaintiff is left litigating related cases in two different courts. The case against the diverse defendant remains in federal court and the now remanded case against the non-diverse defendant remains in state court. The bad faith test could lead to the anomalous situation of a state appellate court finding that the plaintiff has a viable claim under state law (so the plaintiff did not act in bad faith in joining the non-diverse defendant and the case should have remained in state court), yet the claim against the diverse defendant is still in federal court.

Further, in our hypothetical, the federal court's decision on a motion for remand could interfere with a state appellate court's jurisdiction. If the plaintiff had appealed the state court's dismissal of the claim against the non-diverse defendant, and the federal court then remanded the case against the diverse defendant to state court, a question would arise as to whether the state appellate court had jurisdiction to hear the appeal of the state court's dismissal of the claim against the non-diverse defendant. Would the federal court's remand turn what had been a final appealable order into an order that was not final and appealable? If it made the order non-appealable, then the federal court's decision would affect the state appellate court's jurisdiction, which raises another federalism and state sovereignty concern.

Courts have adopted the voluntary/involuntary rule to address the concerns raised by our hypothetical.²⁷⁹ As one court explained:

This voluntary/involuntary distinction is grounded in the observation that when a non-diverse party is eliminated from an action pursuant to court order (i.e., involuntarily), the order of dismissal may be the subject of appeal; consequently, although diversity may temporarily exist between the parties, federal jurisdiction might ultimately be destroyed if the state appellate court reverses the order of dismissal. In contrast, a voluntary dismissal demonstrates a plaintiff's permanent intention not to pursue the case against the non-diverse defendant. As a result, unlike an involuntary

²⁷⁸ There seems to be a split of authority as to whether a state appellate court would even have jurisdiction to hear the appeal of the dismissal of the state court claim. The court in *Turner v. Healthcare Services Group, Inc.* held that 28 U.S.C. § 1446 deprived it of jurisdiction to hear an appeal of the dismissal of claims against a non-diverse defendant when the diverse defendant had removed the case after the state court dismissed the claims against the non-diverse defendant. *Turner v. Healthcare Servs. Grp., Inc.*, 156 S.W.3d 431, 433 (Mo. Ct. App. 2005). *But see* *Hayes v. Henley*, 84 So. 3d 60, 62 (Ala. 2011).

²⁷⁹ *Wiacek v. Equitable Life Assurance Soc'y of U.S.*, 795 F. Supp. 223, 225 (E.D. Mich. 1992) (collecting cases).

dismissal, a voluntary dismissal does not present a threat to continued diversity, and courts will generally permit removal.²⁸⁰

The bad faith test runs afoul of the voluntary/involuntary rule. While unlikely, it is not inconceivable that, as in our hypothetical, a state court would reverse the dismissal of a claim that a federal court had found was filed in bad faith, the very scenario the voluntary/involuntary rule is meant to avoid.

It has also been argued that the state court failure-to-state-a-claim test “is both over-inclusive and under-inclusive.”²⁸¹ One scholar argued that the test would be over-inclusive because it would allow removal when the court decided the plaintiff failed to state a claim upon which relief could be granted, even if non-frivolous arguments supported the claim.²⁸² The argument is that in such cases the failure-to-state-a-claim test would force federal courts to decide novel or ambiguous questions of state law.²⁸³ The author then argued that “[t]he ‘failure to state a claim’ test is under-inclusive because it prevents removal of cases where the plaintiff stated a claim against the [non-diverse] defendant but had no reasonable factual basis for such claim.”²⁸⁴

The article that raised these over-inclusive-under-inclusive concerns was written before *Twombly* and *Iqbal* were decided, so it did not address the implication of those decisions with respect to those concerns. The concerns that the state court failure-to-state-a-claim test is over-inclusive are eliminated if the federal court resolves ambiguous questions of state law and any doubts about the propriety of removal in favor of remand. The concerns about under-inclusiveness show why the state court failure-to-state-a-claim test better respects the principles of federalism and state sovereignty after *Twombly* and *Iqbal*. If a state has retained the notice-pleading standard, then a case should not be removable if the plaintiff has met the state’s notice-pleading standard. And the under-inclusiveness concerns will not come to fruition in states that have adopted the *Twombly/Iqbal* standard because in those states the plaintiff will have to plead sufficient facts to establish the basis for her claim.

These tests that propose adopting a fraudulent joinder analysis based on *Twombly/Iqbal* or some other heightened standard, while having the benefit of applying a uniform standard, fail to address the tests’ effects on federalism and state sovereignty. They also have the potential to create additional procedural or federalism issues. The state court failure-to-state-a-claim test has the benefit of creating a uniform and easily workable standard that respects state autonomy and avoids the creation of additional procedural problems.

²⁸⁰ *Id.*

²⁸¹ Percy, *supra* note 6, at 218.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

CONCLUSION

The federal courts have not adopted a uniform test for questions of fraudulent joinder, and the Supreme Court's decisions in *Twombly* and *Iqbal* have led to additional confusion and inconsistency in the fraudulent joinder analysis in federal district courts and a split among the circuit courts of appeals. The federal courts should abandon their current tests and adopt the state law failure-to-state-a-claim test to analyze questions of fraudulent joinder.

The state court failure-to-state-a-claim test respects state sovereignty. It ensures that state courts are able to hear and decide claims that raise novel questions of state law or questions upon which state law is ambiguous. It also ensures that more lenient state court pleading standards are not co-opted by the fear of removal to federal court. This test also ensures that federal courts do not exceed the constitutional limits of their jurisdiction and it comports with Supreme Court precedent.

The test also respects and protects the authority of federal courts and scarce federal judicial resources. It discourages removal but nonetheless would allow removal in cases where the plaintiff's claim against the non-diverse defendant would not survive a motion to dismiss for failure to state a claim upon which relief can be granted under the state pleading standard.

Finally, it is an easily workable test that is familiar to the courts and counsel. It will simplify the analysis for plaintiffs, defendants, and the federal district courts. This, in turn, will lead to more consistent results.